

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Request for Review by)
Integrated Systems)
and Internet Solutions, Inc.)
of Decision of Universal)
Service Administrator)

CC Docket No. 96-45

Federal-State Joint Board)
on Universal Service)

CC Docket No. 97-21

Changes to the Board of)
Directors of the National)
Exchange Carrier Association,)
Inc.)

Tennessee State Department)
of Education, Application)
(FCC Form 471) for Approval)
of Funding)

USAC Application No. 18132

Opposition To Request for Review
of ISIS 2000

SUMMARY

ISIS 2000, a disgruntled bidder for a Tennessee contract to provide Internet Access Service to the State's K-12 Schools, has asked the Commission to overrule a Decision of the Administrator of the Universal Services Administrative Company favorable to the State (and, thereby, deny Universal Services Fund support for Tennessee Schools), on the basis that the State did not comply with the competitive bidding rules for USF eligibility. Specifically, ISIS 2000 asserts that the State failed to give adequate award consideration to "the lowest pre-discount price proposal", which ISIS 2000 asserts was its proposal. This is simply incorrect.

The State has fully and completely complied with all State and local and USF "competitive bidding rules." This has been determined by the State and by the Administrator after extensive review and analysis, based on lengthy records and hearings. ISIS 2000 has exhausted five (5) levels of State appeal, and has protested seventeen (17) times to the Administrator. It's current request is no more meritorious.

A detailed review of the individual ISIS 2000 inflammatory accusations shows them to be factually incorrect and totally misleading. They have no merit. The State of Tennessee has not "gamed" or "defrauded" anyone. The winning bidder, ENA, has been found to be legally the "most-cost-effective supplier" for the Tennessee Internet Service and to be the supplier which can "most efficiently and effectively" meet the unique needs of Tennessee's rural schools, "price being the primary factor."

The ENA proposal for the Tennessee State Service, Tennessee believes, is better than any in the country, providing a high guaranteed level of service at \$1.97 per child per month, lower than ISIS 2000, and lower than any other ISP in Tennessee. Any suggestion of denying the benefits of Internet Access to Tennessee K-12 Schools when the record and the results are so clear, is preposterous.

Accordingly, the Commission should reaffirm the Administrator's Decision on Point No. 1, and find that the State of Tennessee has complied with the competitive bidding requirements necessary for USF support.

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The Common Carrier Bureau		

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The State of Tennessee ("Tennessee"), acting by and through its Department of Education, and pursuant to Sections 54.719 and 1.45(b) of the Commission's Rules (47 CFR § 54.719 and 1.45(b)) herein respectfully submits its "Opposition" ("Opposition") to the

"Request for Review In Part of Fund Administrator's Explanation of Funding Commitment Decisions" ("Request for Review"), of Integrated Systems and Internet Solutions, Inc. ("ISIS 2000"), dated March 29, 1999.

I. INTRODUCTION

In the above-referenced Funding Commitment Decision of the Administrator of the Schools and Libraries Division of the Universal Services Administrative Company ("Decision" and "Administrator", respectively), the Administrator concluded, in part, that the State of Tennessee, in awarding a contract to Educational Networks of America, Inc. ("ENA") for Internet Access Services for the State's K-12 Schools, had complied with the competitive bidding requirements necessary to qualify for Universal Service Fund ("USF") support (Decision at Point No. 1). ISIS 2000, the unsuccessful bidder for this contract, asks, in its Request for Review, for the Commission to overturn the Administrator's decision in this regard and, thereby, to deny USF support for Internet Access Services in Tennessee.

The State has fully and completely complied with all "competitive bidding requirements" necessary for USF support! The State has completely and fully complied with its State and local Procurement Rules ("State Rules"). This compliance has been confirmed by the State's highest contract review authority, the Tennessee State Contract Review Committee, after an exhaustive investigation and review, requested, and participated in by ISIS 2000, in response to a formal appeal by ISIS 2000. The State also has completely and

fully complied with all USF competitive bidding rules ("USF Rules"). This has been confirmed at the State level and also by the Administrator's decision (Decision at Point No. 1), after an extensive fact-gathering and review, requested and participated in by ISIS 2000, in response to a protest by ISIS 2000 of the State's Application for USF support. Finally, and most importantly, the State has achieved a contract for Internet Access Services which has been universally recognized by the State, and by the Council of Chief State School Officers, among others, as "the most-cost-effective Internet Access Service available" to K-12 students in rural Tennessee, and as providing the "least-cost option for the services requested and required."

Thus, the ISIS 2000 Request for Review with respect to Decision Point No. 1 should be dismissed, and the Administrator's decision that Tennessee has complied with all competitive bidding requirements necessary for funding should be reaffirmed!

**II. THE ADMINISTRATOR WAS CORRECT IN FINDING THAT
THE STATE HAS COMPLIED WITH
ALL COMPETITIVE BIDDING
REQUIREMENTS NECESSARY
FOR USF FUNDING**

A. Full Compliance with State and local State Competitive Bidding Requirements has been confirmed by the State at the highest levels

Section 54.504(a) of the Commission's Rules, sets forth the Commission's competitive bidding requirements for USF support. With respect to State participation, it provides, in pertinent part, that:

(a) Competitive Bid Requirements: An eligible school...shall seek competitive bids, pursuant to the requirements established in this subpart, for all services eligible for support.... These competitive bid requirements shall apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements (47 CFR § 54.504(a))

The Administrator was correct in recognizing that compliance with State and local competitive bidding requirements is a prerequisite to USF eligibility, that the State has fully and completely complied with each and every state and local competitive bid requirement, and that the USF competitive bidding requirements do not preempt those of the State.

As the Administrator correctly recognized, ISIS 2000 repeatedly challenged the State's "competitive bidding" process at the State level. The record in these proceedings clearly

shows that, upon request by ISIS 2000, the State's RFP was reviewed and determined to be in full compliance with State Procurement Rules by the State (through its Office of Finance and Administration). The State's award to ENA was unanimously recommended by four (4) independent State reviewer's, after review of the ENA and ISIS proposals; the selection of ENA then was unanimously made after an independent review by the State Department of Education requested by ISIS 2000; this award then was unanimously upheld under Protest after an appeal by ISIS 2000 to the State Contract Review Committee (consisting of the Commissioner of Finance and Administration and General Services and Comptroller's Office); and then the award confirmation was unanimously reaffirmed after a review by the State's Independent Informations Systems Council (chaired by Commissioner of Finance and Administration and including the State Comptroller as well as members of the Tennessee Legislature and the independent Tennessee Regulatory Authority) ("TRA"). Each stage of review provided for an independent opportunity to be heard by all parties. ISIS 2000 participated in all levels of review, taking full advantage of the State Review Process.¹ At the conclusion of this Process, the State found that the ENA award was in full compliance with, and implemented all, State Procurement Regulations. ISIS 2000 thus has exhausted all of its State appeals. In addition, it has determined not to appeal the State's award to the Courts within the statutory period. Thus, the State's determination is final. State law permits vendors to seek relief and information through the courts and may overturn a contract award. ISIS 2000 sought no such relief.

¹ See Attachment I hereto for a complete listing of the State's Procurement Process, and the appeals by ISIS 2000.

In considering all bids under State Procurement Rules (see Tenn Code Ann. 12-4-109) (Attachment B(1) hereto), the State is required to conduct "fully competitive bidding", to consider "cost to the greatest extent possible in awarding its contract" (i.e., price was the primary factor), and to select the "lowest responsible bid" (i.e., the most-cost-effective bid) (see also, in this regard, Report and Order, FCC Docket 96-45, FCC 97-157 (May 8, 1997) at Paragraph 481) (Attachment B(2) hereto). As noted above, after reconsideration, after full administrative review, after protest and after appeal and then by reaffirmation, the State concluded that the competitive bidding and award requirement had been satisfied and that, in fact, the award had been made to the "least-cost provider" (Attachments E, G and H), which provided services "most efficiently and effectively", all factors considered (Attachment H).

ISIS 2000's argument is that the Administrator should have "expressly" ruled on the State's compliance with USF competitive bidding requirements, independent of the question of compliance with State competitive bidding requirements (Request for Review, page 9). However, the Administrator "has confirmed that the State and local process for competitive bid procurement was followed" (Decision, page 2). And, the Administrator found that there was "no basis" to review the State's findings that the ENA bid was the "most-cost-effective", or the "least cost", or in compliance with State or local law. Thus, in ruling on the State's compliance with its own Procurement Rules, the Administrator did, in fact, rule on the State's compliance with USF Competitive Bidding Rules, since the rules are effectively similar (with the State's Rules being more stringent). Since the State has reviewed and

documented its findings so extensively in this regard (see Attachment A through H, hereto), there was no need and requirement, to "expressly" revisit them independently. In brief, ISIS 2000 has provided not a scintilla of information to refute the Administrator's finding and the State's findings (i.e., that ENA is the "most cost-effective supplier" of Internet Access to Tennessee Schools with price being the primary factor).

B. Full Compliance with USF Competitive Bidding Requirements has been confirmed by the Administrator and the State after extensive review

Wholly apart from the ISIS 2000 assertions discussed above, and dismissed, regarding general compliance with USF competitive bidding guidelines, ISIS 2000 raises three (3) additional assertions. ISIS 2000 asserts that the State's "undisputed bid criteria awarded maximum credit (30 points) to the bid achieving the greatest amount of [USF] funding" and this "incenticized bidders to offer the highest pre-discount price" (ISIS Request for Review at pages 6 and 8, respectively), contrary to Section 54.504 of the Commission's Rules. This is incorrect, in both fact and practice. Contrary to this assertion, the State's bid criteria awarded the maximum cost credits (30 points) to the bid achieving the lowest pre-discount price, in full compliance with USF eligibility requirements. Thus, the State's competitive bid criteria ensured that a bidder would greatly improve its costs credits by offering service at a lower pre-discount price.

As ISIS 2000 correctly notes, the USF eligibility rules do not require Schools to accept the lowest pre-discount price for Service, giving the State "maximum flexibility" in

this area. Rather, they require only that "price be the primary factor" in consideration for an award and that States select the "most-cost-effective supplier" for the access service they require (Id. May Order, at paragraph 481) (Attachment B, hereto). As noted above, this is similar to the State competitive bidding requirements, extensively reviewed by the Administrator.

Under the State Procurement Rules (and thus the State bidding criteria), cost information from competitive proposals cannot be opened until the entire Technical and Management portions of all proposals are evaluated and scored, separately and collectively. This ensures that costing will not distort a reviewer's technical and operational rankings. It also ensures that a particular Technical or Operational approach is not selected simply because it is cheaper, or because it may qualify for greater USF support. Thus, contrary to the ISIS 2000 assertions, the State did not, and indeed could not by law and practice, select the ENA Internet Access Service over the ISIS 2000 WAN facilities because of the possibility of greater or less USF support. This conclusion is supported by the fact that ENA was awarded the K-12 Internet Access Service contract, independent of any USF funding. The Technical and Management portions of the ENA Internet Access Service was awarded the most credits in these categories under the State's bidding criteria because they "most efficiently and effectively" met the State's requirement, as determined by the initial State reviewers and as reaffirmed by the Department of Education, the State Contract's Review Committee, the State Informations Systems Council and the TRA (See Attachment H herein).

Here it is important to recognize a simple fact intentionally ignored by ISIS 2000 in its SLC protests and in its Request for Review. The State did not award a contract to ENA until the Administrative Review Process was completed at the State level. At each step of State review, additional information was gathered, which was then analyzed, tested and utilized by the State to reach a final award decision. This is the proper and normal procedure for protests and appeals. Thus, ISIS 2000 cannot correctly, or properly, simply return to its original RFP submission and proposal costs to the State in order to find support for its arguments when the subsequent record in the review process provided the most definitive determinations and analysis, particularly when ISIS 2000 participated at each level and either provided, or refused to provide, information.

Initial State Evaluation Credit Matrix²

	Technical	Management	Cost	Experience	Totals
ENA	35.375	13	30	9	87.375
ISIS 2000	26	12.125	20.837	8.5	67.462

Only after the Technical and Management proposals were evaluated and ranked were cost proposals reviewed. The State's bid criteria awarded the maximum cost credits (30) to

² Upon State Administrative Review, ISIS 200 was determined effectively non-responsive due to the "confusing and inconsistent" nature of its supporting data, and to the glaring omissions from its cost data (see Attachment E, hereto). Thus, this data is the most favorable to ISIS 2000, and does not reflect the results of the review.

the bidder achieving "the lowest pre-discount price", i.e., the total price of the Internet Access Service including State and USF support (47 C.F.R. § 54.500(i)).

During the course of the State evaluation, review and protest, it became apparent that one bidder, ISIS 2000, had, either intentionally or unintentionally, attempted to distort the costing process by eliminating key elements included in its Technical and Operational proposal from its costing data (i.e., it did not include the costs of key components in order to receive higher cost credits). After clarification attempts by the State were rebuffed, the following cost comparisons were presented; they were not challenged by ISIS 2000 and this was "accepted by each party during the extensive review hearings" as reflective of true costs of each proposal (see Attachment D, hereto):

Pre-Discount Cost Comparison

	<u>ENA</u>	<u>ISIS 2000</u>	<u>BellSouth.net</u>
A. Program cost ³	\$74,352,000	\$187,000,000	\$190,000,000
B. USF Funding	\$49,072,000	\$123,420,000	\$125,665,000
C. 1998 State Funding	\$25,370,000	\$63,580,000	\$64,738,000

³ Cost Comparisons are for the contract period, not for the purposes of 1998 USF support. Such support is reflected in Form 471, Line 15 "Shared Services." Cost Comparisons arose and were clarified over the appeal and review process described above, and before any final State contract.

Thus, ENA also was determined to offer the "lowest pre-discount price" for the services desired (Cost Comparison Chart, Line A).

This cost analysis was undisputed in the Protest hearings where ISIS 2000 had full opportunity to refute the analysis in two (2) days of hearings.

With respect to the ISIS 2000 initial RFP submission (which ISIS 2000 continually but incorrectly, asserts represents a \$23M less expensive pre-discount price than the ENA proposal) (Request for Review at page 9), the State, on a solid, well-documented, factual base, unchallenged by ISIS 2000, concluded that this was technically and economically impossible. In summary, the Technical and Operational promises could not be delivered at the proposed price. Further, the ISIS 2000 proposal, because it was for a facility not a service, relied extensively on "future upgrade" and "change orders." Indeed, the State considered rejecting the proposal "out-of-hand" because of its reliance on distortions, incorrect data, and misinformation designed to foster later cost increases. The ENA Internet Access Service, on the other hand, eliminated all risk, including "change orders", "technical obsolescence" and "hard to find maintenance in rural Tennessee."

Contrary to the ISIS 2000 inflammatory language, there also was no "gaming" with respect to increasing USF support. As the Commission is aware, USF support is directly proportional to State funding. In this case, the State has committed funding in the amount of \$17.5M "cash" and \$7.5M in "savings", for a total of \$25M. It has submitted an Application

for USF support for the first year of that commitment. The State couldn't do anything but contribute its share and request the support for which it is eligible. Based on free lunch program statistics, this was 69% at the time of the Application. Thus, it requested support for 69% and paying 31% of the pre-discount price.

Further, there are no "issues" regarding "improper incentives." A bidder that decreased State and local spending, also decreased USF funding available, proportionately. In every case, the State stated that it would pay its proportional share, as required by the USF Rules. For example:

Model Showing State's Incentive to lower costs

	<u>Bid Price Option 1*</u>	<u>Reduced Bid Price Option 2*</u>	<u>Reduced Bid Price Option 3*</u>
Bid Amount	\$75.00	\$70.00	\$65.00
State net cash	\$17.50	\$15.83	\$14.16
Savings	\$ 7.50	\$ 7.50	\$ 7.50
State appropriation/ amount paid to bidder	\$25.00	\$23.33	\$21.66
USF Net cash	\$50.00	\$46.66	\$43.33
Bidder Cost Factor	4.286	4.422	4.589

* Dollar amounts are in Millions

Note: Cost factor and State point credits raise as bid prices are lowered

Thus, as can be seen, the lower the State cost, the lower the USF funding, and thus the greater the cost credits under the State bidding criteria.

Finally, with any proposal response there is an incentive by the bidder to achieve greater State spending. This is done by offering a greater or better technical proposal than a competitor. The ENA proposal offered a "superior" technical service (Attachment H, hereto), thus it would be reasonable to assume more cost would have to be entailed for the State (and proportionately by the USF). Indeed, the Rules encourage schools to select offerings that best meet their unique needs, but to competitively select the "most-cost-efficient supplier", and to pay a proportion of the cost. In the instant case, however, since the final ISIS 2000 proposal was not a lower cost, this did not occur. However, if it had occurred, the greater cost would have been paid proportionately by the State, through cash or savings or both. As noted earlier, the State benefitted by the "savings" (recommitting it to the Service) and the USF benefitted by the reduced USF support and by the elimination of the requirement to support an interim supplier.

Finally, in evaluating whether the Rules have been complied with and whether "the most-cost-effective supplier of access" has been selected, the State also believes that the underlying determination rests on "what is the comparable cost of Internet Access?" On a per student basis, ENA is clearly the most-cost-effective.

Internet Cost Per Student

	<u>ENA</u>	<u>ISIS Final</u>	<u>BellSouth</u>	<u>ISIS Initial</u>
42 month contract prices	\$74,000,000	\$187,000,000	\$190,000,000	\$75,000,000
Computers w/effective Internet Access	90,000	90,000	90,000	45,000 ⁴
Students w/effective Internet Access	900,000	900,000	900,000	450,000
Effective cost/computer/mo	\$19.58	\$49.47	\$50.26	\$39.68
Effective cost/child/mo	\$ 1.96	\$ 4.95	\$ 5.03	\$ 3.97

In conclusion, after the State's full review process had been completed, the factual record reflected that the bidding criteria had resulted correctly in the award to ENA as offering the Service at the "lowest pre-discount price" and "most efficiently and effectively meeting the Schools needs." Just as importantly, however, the Administrator reached the identical conclusion regarding USF eligibility criteria, based on this record. It had considered "pre-discount price" and had awarded the contract to the entity offering the lowest pre-discount price for the Service offered.

⁴ In the State's judgement, a service provider without caching but with comparable transport capacity has no more than 1/2 of the effective delivery, and it could be as little as 1/4 of the effective delivery. This means, particularly for education purposes, since children and teachers go to the same sites over and over, ISIS 2000's Service was conservatively 1/2 of the Service under the State's solution.

III. THE STATE IS THE PARTY REQUIRED BY THE RULES TO DETERMINE ITS INTERNET ACCESS REQUIREMENTS

Finally, ISIS 2000 is asking the Commission to substitute its own judgement (or the judgement of ISIS 2000) for that of the State in establishing an appropriate level and type of Internet Access Service, and thereby of USF support. ISIS 2000 "chooses for the State" an incremental Wide Area Network (WAN) to be owned by the State, and to be upgraded and managed by ISIS 2000 on an "as-needed" basis. It asks the Commission to impose this on Tennessee in order to "reduce eligible first-year USF dollars."

Section 54.511 of the Commission's Rules provide, in pertinent part, that:

- (a) "In selecting a provider of eligible services, schools...may consider relevant factors other than the pre-discount prices submitted by bidders."

The Commission has applied greater clarity to this Rule as follows:

"In the Recommended Decision, the Joint Board recommended that the Commission adopt rules that give schools and libraries the maximum flexibility to purchase whatever package of telecommunications services they believe will meet their needs most efficiently and effectively" (In Re: Report and Order 12 FCC Rcd. 8776 (1997) FCC 97-157, page 428).

And:

"Because we will require schools and libraries to pay a portion of the costs of the services they select, we agree with the Joint Board that, as recognized by most commentors, allowing schools and libraries to choose the services for

which they will receive discounts is most likely to maximize the value to them of Universal Service support and to minimize inefficient uses of service (In Re: Report and Order, paragraph 432).

On this basis, Tennessee "chose" an Internet Access Service, on the basis that Tennessee believes this is what is required in rural areas with no available facilities support. It based this belief on its extensive experience. It "chose" ENA, through competitive bidding, on the basis that it offered the "most efficient and effective service at the least cost for service." Tennessee fully recognizes that both Tennessee and the USF will be required to support this Service. However, Tennessee submits that this is exactly what Congress mandated "...Internet Access Service to K-12 Schools", not WAN facilities that may not work because they can't be maintained in service in rural areas as proposed by ISIS 2000. The Commission should not accept the ISIS 2000 judgement, or substitute any other.

IV. CONCLUSION

Pursuant to the competitive bidding process, Tennessee has selected the Internet Access Service its rural environment requires, it has received competitive bids, analyzed them, reviewed them and awarded a contract to a "least-cost provider", which will guarantee the "most-cost-effective service to its Schools." Therefore, it should be supported.

ISIS 2000 raises numerous costing issues each of which has been reviewed and rejected on numerous occasions over the last year by the State and by the Administrator.

While the Commission need not defer to these decisions, they do need to rely on the factual basis for them, as they are clearly set forth herein. The facts can lead to no other conclusion than that the competitive bidding process has been fully and completely implemented and the Administrator's decision on Point No. 1 should be reaffirmed.

Respectfully submitted

STATE OF TENNESSEE

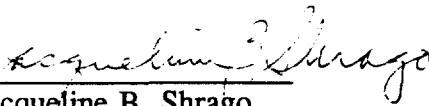
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April 13, 1999

AFFIDAVIT

I, JACQUELINE B. SHRAGO, the undersigned, do hereby declare under penalty of perjury that the facts contained in the foregoing "Opposition to Request for Review" of the Tennessee Department of Education are true and correct to the best of my knowledge, information and belief informed after reasonable inquiry.



Jacqueline B. Shrargo

Executed on this 13th day of April, 1999.

CERTIFICATE OF SERVICE

I, Christine L. Zepka, hereby certify that copies of the foregoing Opposition to Request for Review of the State of Tennessee were mailed, postage prepaid, on this 13th day of April, 1999, via first class mail, to the following individuals at the address listed below:

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Christine L. Zepka

Attachments

- A. Council of State School Officer's Executive Director letter to FCC Chairman, dated April 29, 1998 regarding the Tennessee Internet Program, Competitive Bidding and Service Choice.
- B.
 - 1. Tennessee Code Annotated 12-4-109 regarding the award of Contracts for State Services and Protest criteria and procedures.
 - 2. USF competitive bidding requirements (costing).
- C. BellSouth Telecommunications, Inc. letter to the Tennessee Department of Education, dated May 4, 1998, independently finding the ISIS 2000 proposal had "seriously underestimated" costs by at least \$20 million over 3.5 years."
- D. State Department of Education decision in response to ISIS 2000 Protest, dated May 4, 1998, finding that (1) the ISIS 2000 bid was "incomplete and confusing; (2) the State was obtaining only "services" and no equipment; (3) the ENA Internet proposal was "identical" to proposals by AOL and BellSouth.net; (4) the basis for the State selection and requirement; and (5) the "superior" proposal by ENA with verbal explanation of Exhibit 4 from Protest Hearing (2 pages).
- E. State Contracts Review Committee RFP Appeal Presentation, dated April 6, 1998, finding: (1) the unique requirement in Tennessee necessitating an Internet Service, based on historic experience with ConnectTEN in rural areas; (2) the ISIS 2000 pre-discount price was at least \$24 million "understated"; and (3) the "service" approach was the "most efficient and cost effective" for Tennessee.
- F. State Procurement SB-3307 approving "new" State funds for the Internet Service, supporting the State's willingness and ability to assume its proportionate share of costs and risk for its selection.
- G. State Record of Verbal Presentation of the Tennessee Department of Education dated April 6, 1998, to the State Review Committee, RFS 97-02 Hearing on Protest by ISIS 2000, delineating the Internet Access Service components required in Tennessee (see E, above).
- H. Letter to the Schools and Libraries Corporation from the Review Commissioner; Commissioner of Finance, Comptroller of the Treasury, Commissioner of General Services and Commission of Education, dated August 2, 1998 for

stipulating that, under Tennessee Code Ann. 12-4-109, the State had found the ENA contract award (1) "in compliance with its procurement regulations"; (2) the "most-cost-efficient" bid; (3) the "least cost", under both State and USF funding rules; and (4) the "most efficient and effective", all factors considered and recognizing that the State has the discretion under the USF Rules to "choose the offering that meets its needs most efficiently and effectively."

I. List of State Review Procedures and Hearings.